

Report of the Environmental Advisory Council Concerning the Land and Water Management Division

April 2008

Introduction

In July 2007, Department of Environmental Quality (DEQ) Director Steven Chester asked the Environmental Advisory Council (EAC) to recommend how the DEQ can protect and preserve Michigan's valuable land/water interface resources administered by the Land and Water Management Division (LWMD), while being more responsive to legislators and to the public. Director Chester's charge to the EAC is included as Attachment 1.

Since that request, the EAC has undertaken an extensive review of LWMD programs in general, with specific emphasis on wetland, inland lakes and streams, dam safety, sand dune, and Great Lake submerged lands programs. It was on the budgetary and administrative issues facing the LWMD and discussed implementation issues with LWMD staff. The EAC also met with and discussed the perceptions of and experiences with these programs with panels of regulated parties and the environmental/conservation communities.

Based on this review, the EAC offers this report in response to the Director's request.

Summary of Findings and Recommendations

The LWMD faces considerable challenges in meeting its responsibilities to protect Michigan's sensitive natural resources. Beyond the difficulties inherent in the programs it administers, the LWMD does not have sufficient funding and staffing to fulfill its statutorily assigned responsibilities. Decreasing funding support coupled with increasing program responsibilities has created a structural imbalance that is distorting LWMD operations and that, if unaddressed, will have significant consequences to the people and natural resources of Michigan.

This structural imbalance however is unlikely to be addressed through any significant increase in funding in the near term, and with LWMD's own internal reviews having nearly maximized efficiencies, the need for a more comprehensive and innovative approach is essential. Therefore, the EAC recommends that the LWMD take steps to more keenly focus its efforts on the greatest risks to Michigan's sensitive lands, resources, and ecological functions and processes, and curtail other services and operations accordingly. The LWMD should explore the potential for expanded regulatory roles for other governmental bodies and public informational roles for non-governmental organizations in protecting Michigan's natural resources to supplement the LWMD's diminished capabilities.

The DEQ should seek a process with broad societal participation to develop a long-term strategy to secure adequate funding for the LWMD to fulfill its statutory and public trust responsibilities.

Findings

1. The LWMD is responsible for protecting the resources at the land-water interface and other sensitive natural resources. This responsibility includes wetlands, stream banks and bottoms, floodplains, floodways, and lake bottomlands and critical dunes. These programs are all important to the protection of Michigan's environment and the work LWMD is doing is a valuable service to the people of the state. The EAC recognizes the staff and management of the LWMD for the dedication they bring to their job and the efforts they have made to meet their statutory responsibilities and improve program administration in the face of the challenges and budgetary constraints described in this Report.
2. The LWMD faces significant challenges in administering the programs under its responsibility. These challenges primarily arise from:
 - The need to make permit decisions that raise conflicts between desired environmental outcomes and private decisions affecting the use of land.
 - The need to apply difficult subjective criteria in permitting decisions.
 - A high volume of cases, related to both permitting and compliance.
 - A diverse regulated community that may not have on-going interaction with, or an understanding, of the DEQ and regulatory programs.
 - A general lack of understanding among the public of what is strictly required by the laws and regulations.
 - Insufficient or out-of date computer technology and other equipment that needs to be either updated or replaced to improve efficiency.
3. The LWMD is criticized by some for acting beyond its regulatory and statutory requirements and by others for failing to fully achieve the protections afforded by the statutes it administers. At times, this criticism may be on the same issue or permitting decision.
4. Over the recent past, the LWMD has experienced an erosion of funding, with a corresponding reduction in staffing levels.
 - Since 2002, general fund appropriations have decreased from \$7,727,700 to \$5,593,200, a reduction of nearly 28 percent.

- Since 2005, LWMD has received \$8 million of supplemental funding, consisting of many one-time funding sources such as state Environmental Protection Funds. Such funding sources are now limited or no longer available.
 - Permit application revenue has decreased due to a drop in applications and an increase in the percentage of applications in lower fee categories.
 - Expenditure savings has been achieved due to the early retirements in 2002-2003, banked leave time, furlough days, consolidation of Administration with the Office of Geological Survey, reducing travel and other overhead costs through internal efficiencies, and executive directives. LWMD also reassigned several staff that were funded primarily by general funds or fee revenue to federally funded positions.
 - The overall LWMD budget has decreased since 2002 from \$14.2 million to \$13.8 million. Because of increased costs, the real buying power of this allocation means the LWMD can now fund 112 staff, in comparison to the 135 funded in 2002. Thus, LWMD has lost 17 percent of its staff (23 positions) since 2002.
5. LWMD statutory and program responsibilities have increased during this period due to additional statutory amendments, the evolution of regulatory programs, emerging issues, and issues surrounding the LWMD budget.
- The 2002 amendments to statutes governing wetland and Great Lakes Submerged Lands created a major workload increase relating to beach maintenance activities.
 - New legislatively mandated permitting procedures and timelines (established in Part 13 of the Natural Resources and Environmental Protection Act), created additional administrative, application tracking, and reporting duties. The LWMD's antiquated database increases the burden in these duties.
 - Wetland mitigation and conservation easements have become more common aspects of permits in recent years demanding more individual staff attention.
 - Emerging issues, such as offshore windmills, road-end marinas, lighthouse conveyances, and Great Lakes low water levels, have required significant staff time.
 - Attending to on-going budget issues has limited division management's ability to address program issues, improve guidance/policies, update

statutes and rules, work on program improvements, and mentor field staff where appropriate.

6. As the result of decreasing appropriations and loss of staff with an increasing workload, the LWMD faces a significant structural imbalance between meeting its assigned legal responsibilities and the funding it is afforded to meet those responsibilities.
7. Two of the outcomes of this imbalance are high workloads and stress. As a result, the LWMD has a high rate of staff turnover. For example, eleven changes occurred among the ten people in the Southeast Michigan Office between 2002 and 2006. The effect of this turnover is significant because LWMD staff require a high degree of specialized field training that often has to be provided by senior employees, rather than being available through a specific college degree program. This need lengthens the time necessary for new staff to be proficient in their role. In addition, the LWMD has had significant turnover in top management positions. Since 2002, five individuals have served as the LWMD Division Chief and four have served as the Assistant Division Chief.
8. The LWMD has conducted a formal review of its permitting process to improve cycling time ("value stream mapping") and implemented a variety of operational and program improvements in response to the disparity between funding and responsibilities. General and minor permit applications are now managed entirely in the district offices, a partial implementation of the LWMD's value stream mapping recommendations. An expedited permit process was implemented for projects identified as having minimal resource impacts.
9. In response to statutory deadlines and other pressures for timely decision-making on permit applications, the LWMD has given priority to its permitting activities over activities to respond to citizen complaints and ensuring compliance with the law. As a result, only 50 percent of the low priority and 58 percent of the moderate priority complaints of violations were investigated last year. While the LWMD database is not robust enough to provide specific data, the LWMD reports that inspections to ensure compliance with permit conditions are rare. The LWMD has had to forego many collaborative activities with outside organizations, such as outreach to stakeholder groups at annual conferences, due to travel and staffing restrictions.
10. The LWMD is not able to meet its state and federal mandates and constitutional obligations. Required site inspections for Great Lakes Submerged Lands minor permit applications are not occurring. Statutorily required decision deadlines were missed for 179 applications in FY 2007. The inability to conduct site inspections is likely allowing inappropriate use of public trust bottomlands, illegal wetland fills, and the impairment of inland lakes and streams.

11. The failure to address the structural imbalance between its regulatory burden and resources in the LWMD programs will have significant consequences to the people and resources of Michigan, including:

- Loss of wetlands and public bottomland resources.
- Reduced services to applicants and the public.
- Permitting delays and uncertainty to construction and development projects, creating an impediment to economic activity, resulting from longer permit decision-making times.
- Lack of response to complaints of illegal activities.
- Insufficient training opportunities for staff (there has been no division wide training since 2001) and limited coordination across district lines and with DEQ's sister agencies.
- Minimal outreach to the public and regulated community.
- Inability to adopt new efficiencies that require investments, such as up-to-date technology, or decentralizing and streamlining the permitting process as recommended by the value stream mapping process.

12. By delegation from the U.S. Environmental Protection Agency, the DEQ through the LWMD administers the federal Clean Water Act Section 404 (wetlands, lakes and streams protection program). State permits issued under Michigan law satisfy this federal permitting requirement, providing significant benefits to Michigan citizens and natural resources. These benefits include more comprehensive and timely permitting decisions. The structural imbalance in LWMD programs puts the Section 404 delegation at risk. The loss of delegation would impose additional costs on Michigan citizens and businesses.

13. To minimize these consequences and allow the LWMD to successfully fulfill its mission, efforts to correct the imbalance must be implemented. This correction will entail some combination of adjustments to funding, staffing levels, and programmatic responsibilities.

14. While the LWMD plans to continue to investigate and implement operational and program improvements, the structural imbalance in its funding limits the LWMD's ability to do so. Moreover, the gains from such efforts will not be sufficient to address the structural imbalance between the LWMD's funding and responsibilities. Adequate targeted investment would allow program improvements such as decentralizing permitting activities (as recommended by the value stream mapping process), increasing efforts to educate the regulated community, partnering with local units of government and non-government

agencies in providing education and outreach to the public, and improving the quality of permit applications filed with the LWMD.

15. Given the limitations on the overall state budget, the LWMD is unlikely to be afforded significant new funding in the short term.
16. Given the importance of the natural resources under its responsibility, and the value placed by the public on those resources, it is not likely, nor acceptable, that LWMD responsibilities would be curtailed through the wholesale elimination of one or more its regulatory programs.
17. Because the capability of the LWMD to protect Michigan's natural resources is diminished as the result of the structural imbalance in its funding, other organizations may have to play an expanded role in that effort.

Recommendations

1. While the LWMD has increased the use of minor permits and moved that function to the field, the DEQ should also look at additional streamlining approaches, such as greater use of general permits and permits by rule.
2. To address the imbalance between funding and responsibilities in the near term, the LWMD should purposefully reconsider its operations to focus its efforts on the greatest risks to Michigan's sensitive lands, natural resources and ecological functions and processes. This reconsideration may impact the services LWMD provides, how it processes permit applications, the nature of the technical reviews it conducts, how it responds to citizen complaints, and other aspects of current operations. These difficult decisions as to how the LWMD can allocate its limited resources to best protect Michigan's natural resources should be based on program experience, identified criteria, and a risk-based approach. Decisions should be made through a process that includes appropriate stakeholder involvement and a schedule commensurate with the need to move in a timely manner. If necessary, the DEQ should seek legislative amendments or amend administrative rules to enable and implement these changes. The EAC supports the immediate actions the LWMD is taking to implement this recommendation. See Attachment 2.
3. The DEQ should seek a process with broad participation to develop a long-term strategy to secure adequate funding for the LWMD to fulfill its statutory responsibilities.
4. The DEQ should maintain authorization to implement the federal Clean Water Act Section 404, wetlands, lakes and stream protection program. If funding and staffing levels are further eroded the DEQ should consider deferring certain regulatory activities to the federal government and, as necessary, develop

regulatory tools or recommending amendments to Michigan law to allow such deferral. However, the DEQ should immediately consider reducing duplication in permitting activities covered under the federal delegation. For example, the DEQ should evaluate whether it is necessary and appropriate to conduct an independent state review for Section 404 activities on the Great Lakes and connecting channels where the Army Corps of Engineers is conducting a similar review.

5. The LWMD should explore the potential for expanded regulatory roles for other governmental bodies and public information roles for non-governmental organizations in protecting Michigan's natural resources to supplement the LWMD's diminished capabilities.
6. In order to further the dialogue and disclose the issue, the DEQ should widely share these findings and recommendations with interested parties and other decision-makers to ensure they are aware of the difficulties LWMD faces, the implications of failing to address those difficulties, and the steps that can and should be taken in the short and long term to resolve the structural problem.

ATTACHMENT 1

DEPARTMENT OF ENVIRONMENTAL QUALITY REQUEST TO ENVIRONMENTAL ADVISORY COUNCIL

July 19, 2007

BACKGROUND

The Land and Water Management Division (LWMD) is responsible for land/water interface resources (inland lakes, streams, shorelands, wetlands and sand dune areas). The mission of the LWMD is “to promote the best use of these resources for their social and economic benefits while protecting associated resource values, property rights, the environment, and public health and safety.”

The LWMD administers numerous parts of the Natural Resource and Environmental Protection Act, including the Floodplain Management, Inland Lakes and Streams, Wetlands Protection, Dam Safety, Shorelands Protection and Management, Great Lakes Submerged Lands, and Sand Dune Protection and Management. With respect to wetlands protection, Michigan was the first and is still one of only two states that have been delegated authority to administer the federal Clean Water Act lakes, streams and wetland program.

Given the interrelatedness of the programs under its jurisdiction, LWMD has developed a “Consolidated Permit Program.” Under this approach, applicants submit a single application, and LWMD staff provide a simultaneous review under all applicable statutory authorities. Consequently, a permit issued by the LWMD can represent multiple authorizations (e.g., a permit can represent both a wetlands and an inland lakes and streams authorization).

LWMD processes approximately 6000 permit applications annually under its Consolidated Permit Program. Approximately 69 percent of projects are permitted as proposed, and another 17 percent are permitted with modifications. Permits are denied for about 2 percent of proposed projects, and applications are withdrawn for 11 percent of projects.

The workload of the LWMD is arguably the heaviest within the DEQ. LWMD experience has shown that when staff workloads consistently exceed 160 files per staff per year, the number of applications exceeding statutory processing deadlines increases, compliance activities decline, and public outreach and the ability to respond to customer inquiries precipitously declines. Current LWMD staff workloads range from 176 to 263 files per staff per year.

A significant percent of complaints the DEQ Executive Division receives from legislators involve LWMD matters, in particular alleged “over or inconsistent regulation” on wetlands issues. Conversely, many if not most of the complaints from citizens may be characterized as “under-regulation” in protecting land/water interface resources.

CHALLENGE

How can DEQ protect and preserve Michigan's valuable land/water interface resources while also being responsive to the complaints of legislators and the public regarding our efforts to do so? What programmatic, policy, education, communication or other recommendations/suggestions does the EAC have to accomplish both objectives?

PROPOSED SCHEDULE FOR EAC CONSIDERATION

Meeting 1 (July 19)

Challenges for sensitive resource protection programs (Pruss)
Program overview (Browne/Fish)

Meeting 2 (August 16)

Funding structure and pressures
In-depth presentations on 2 - 3 programs

Meeting 3 (September 20)

LWMD's Value Stream Mapping process and recommendations
Panel of LWMD field staff

Meeting 4 (October 18)

Panel of regulated parties
Panel of environmental/conservation interests

Meetings 5 (November 14) and 6 (December 13)

Discussion of possible recommendations

Meeting 7 (January 17)

Review draft recommendations

Meeting 8 (February 21)

Finalize recommendations

ATTACHMENT 2

Realigning Work with Available Resources Land and Water Management Division Department of Environmental Quality April 15, 2008

The Land and Water Management Division (LWMD) does not have sufficient funding and staff to adequately administer laws protecting wetlands, inland lakes and streams, Great Lakes bottomlands, sand dunes, and other sensitive natural features. The structural imbalance between its responsibilities and available resources results from decreasing state and federal funding, loss of staff, and obsolete data systems. The LWMD is realigning its work to address the highest priority needs until the structural imbalance is corrected. This realignment will result in adverse impacts to some natural resources and loss of some services to the public. These actions are consistent with a DEQ Environmental Advisory Council review of the LWMD's situation.

Immediate Actions

1. **Issue permits for the five years allowed by law.** This eliminates steps necessary to extend permits beyond the initial (usually two or three years) time frame. It also reduces problems created by applicants forgetting to extend a permit or seeking an extension after a permit has expired. There are two exceptions to this policy. The sand dune permit period is being extended from one year to two years, based on an agreement with the Critical Dunes Area Stakeholders Work Group, because dunes are extremely dynamic systems. Dam safety permits are limited by administrative rule to a two-year duration.
2. **Strictly follow legally required permit application processing procedures and time frames ending the current practice of allowing applicants to re-activate an application after "withdrawing" it.** Statutes and administrative rules specify time frames in which the LWMD is to review applications for administrative completeness and technical sufficiency. In some cases, these time frames do not allow sufficient time to cure defects in inadequate applications. In such cases, the LWMD has been allowing applicants to withdraw their application and then re-activate it after deficiencies have been cured. In order to ensure it meets decision-making requirements and encourage better initial applications, the LWMD will no longer allow the withdraw and re-activation of applications.
3. **Process most general permit/minor project applications with minimal review and no site inspection.** In 2007 over 58 percent of the non-transportation project applications were either minor project (MP) or general permit (GP) applications. Staff will now process a MP/GP application without conducting a site inspection if the application is reasonably complete, photographs of the site are provided, and there is no reason to suspect significant problems with the project. This better targets staff resources to projects with the greater potential for negative environmental impacts.

4. **Forego response to lower priority complaints about unauthorized activities.**
The LWMD categorizes complaints of unauthorized activities into a priority category based on size and scope of environmental impact and threat to public health and safety. In 2007, staff could only respond to 75 percent of the high and 58 percent of the moderate priority complaints, but still responded to 50 percent of the low and not-a-priority categories. In order to devote limited staff resources to the biggest environmental and public health and safety threats, the LWMD will no longer respond to complaints of illegal activities in the lower priority categories.
5. **Suspend LWMD review of designated wetland and inland lakes and streams permit applications, deferring to decisions by the U.S. Army Corps of Engineers (Corps) in areas of joint jurisdiction.** LWMD will propose a general permit under inland lakes and streams and wetland laws to authorize minor activities in waters where the Corps has federal jurisdiction.¹ The DEQ authorization would be based on approval of the proposed activity by the Corps. Under the general permit, the LWMD would not conduct its normal environmental review, which would eliminate some duplication with the environmental review by the Corps. However, it would also eliminate the current coordination of other state and federal agency reviews, which has been part of the LWMD's involvement. The general permit would be issued for two years, after which the LWMD would evaluate the benefits and costs of this approach.
6. **Require payment of appropriate fees for all pre-application meetings requested by an applicant.** Public Acts 435 and 592 of 2006 require a fee for the opportunity of meeting with the LWMD in preparation for submitting a wetlands or inland lakes and stream permit application. In order to fully meet legal requirements and encourage more efficient early interaction, the LWMD will consistently require the fee for the initial and all subsequent pre-application meetings (including site visits) requested by a person considering an application.

Impacts of These Actions

The LWMD will be targeting its activities to the greatest risks to Michigan's sensitive natural resources. However, reducing the review and oversight of permit applications and reported violations will result in some loss of wetlands and public bottomland resources, impacts to the riparian rights of property owners, and lack of response to complaints of illegal activities. Longer permitting times for poorly developed applications will create delays and uncertainty for construction and development projects slowing some economic activity. These actions will also result in reduced services to applicants and the public and minimal outreach to the public and the regulated community.

¹ Aquatic resources under this joint jurisdiction include the connecting channels of the Great Lakes; tributaries of the Great Lakes upstream to the limits of traditional navigation (including significant reaches of large rivers such as the Grand River and the Saginaw River); inland lakes connected to the Great Lakes (e.g. Lake Charlevoix, Muskegon Lake); and wetlands associated with all of these water bodies. Adjacent wetlands will not be included because of uncertainties regarding federal jurisdiction over these resources. This will minimize public confusion and reduce the possibility of applicants being caught in limbo by the DEQ issuing GP coverage and then the Corps waiving jurisdiction,